United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

To Be Argued By
Joseph I. Stone, Esq.

74-1037

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-1037

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UNITED STATES OF AMERICA,
Appellee,

-v-

ALAN MORRIS,
Defendant-Appellant.

----------x

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

ALAN MORRIS

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PRELIMINARY STATEMENT

The appellant, ALAN MORRIS, appeals from a judgment of the United States District Court, Southern District of New York, before Honorable Marvin E. Frankel, U.S.D.J., and a jury, of the crime of conspiracy to violate the Federal Narcotic Laws, Title 21, U.S.C., Section 812, et-seq. The appellant was sentenced on January 3, 1974 to a term of eight years imprisonment, five of which were to run concurrently with a sentence imposed in the United States District Court of Michigan. The defendant is currently incarcerated, and the undersigned represented the appellant on trial in the United States District Court, and the assignment was continued pursuant to an order of this Court dated January 17, 1974.

STATEMENT OF FACTS

The defendant-appellant, ALAN MORRIS was tried with five other co-defendants (now co-appellants), in a trial which began before Judge Frankel on October 18, 1973 and lasted until November 18, 1973.

Prior to trial Judge Frankel held extensive suppressive and minimization hearings, most of which did not concern Morris.

Rather than burden this Court with additional recitation of the facts, defendant-appellant will rely upon the Statement of Facts submitted by co-appellants.

The record, which consisted of over 4000 pages, was used by the undersigned to review the facts and the law and is now being shared with co-counsel and at the present time, is unavailable for insertion of page numbers. A previous application to be relieved as counsel for Alan Morris on this appeal was denied by the court. However, a letter was sent to Mr. Morris in February, 1974, advising him of the issues I would submit to the Court and inviting him to add any legal issues that he thought had merit and they would be included on his behalf.

QUESTIONS PRESENTED

1. MORRIS WAS PREJUDICED BY THE ADMISSION OF POST CONSPIRACY EVIDENCE.
2. MORRIS WAS ALREADY PLACED IN JEOPARDY FOR THE SIMILAR EVENTS AND TRANSACTIONS FOR WHICH HE NOW STANDS CONVICTED.
3. THE DEFENSE OF THE CO-DEFENDANTS WAS ANTAGONISTIC TOWARD MORRIS AND A SEVERANCE SHOULD HAVE BEEN ALLOWED. THE EVIDENCE SHOWED A MULTIPLE CONSPIRACY AND A JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

ARGUMENT

POINT I

There were many items of post-conspiracy evidence allowed against the defendant Alan Morris over defense objection.

The well established general principles that evidence of other crimes is inadmissible (International Shoe Machinery Corp. v. United Shoe Machinery Corp., 315 F. 2d 440, 459; 1 Wigmore Evid. 3rd par. 64; Jones v. U.S., 42 S.Ct. 218;) Stone's "Rule of Exclusion of Similar Fact Evidence", 51 Harv. Law Rev. 988 and that evidence of post-conspiracy crimes and activities is also inadmissible, Campanelli v. Grave, 266 F. 2d 445; 31 A C.J.S. 879 et seq. The above legal principles places the burden on the prosecution to show clearly the proper relevancy of one of the accepted exceptions to these general principles. The prosecution should have the burden of overcoming defendant's objections of surprise and undue jury influence.

The appellants are not complaining of some inadvertent mention of a post-conspiracy crime but of some 2,000 pages of testimony allowed into evidence over vigorous objections.

The exception as to intent and scienter cannot be applicable since intent is inherent in the charged crime and thus evidence of other crimes is solely prejudicial as showing propensity, People v. Dales, 285 App. Div. 214, affd., 309 N.Y. 97; Fallen v. U.S., 220 F. 2d 946, cert. den. 350 U.S. 921; Hernandez v. U.S., 370 F. 2d 171; 29 Am.Jur. 2d 374.

The cases that have permitted such testimony are based on grounds of res gestae (Drews v. State of Minnesota, 407 F. 2d 130) or as closely related to place, time or method (Nees v. Culbertson, 406 F. 2d 621; Girardi v. Gates Rubber Co., 325 F. 2d 196, 203; 29 Am. Jur. 2d 377) are not in point. The evidence therein ran from a few minutes to about six months maximum and involved essentially the same defendant alone. Herein the post-conspiracy testimony covered a period from about thirteen months to over two years. Extensive reserach discovered only one pertinent case, Kercheval v. U.S., 12 F. 2d 904, rev. on other gds., 274 U.S. 22, in which testimony of identical type frauds by the same defendant committed more than a year after the charged crime, specifically was held to be prejudicial per se, as too remote. Shepard's shows a lack of subsequent citation for this case. It is respectfully suggested

that this is not because the case is poor law or exceptional but because there has been no need for it to be cited. Courts just do not allow such evidence.

The main theory on which the trial court herein did allow this testimony was that it could be considered by the jury to relate back both as to the truth of the existence of the charged conspiracy and as to the parts played therein by the appellants directly involved in each of the several lines of post-conspiracy testimony.

Despite the carefully worded rulings ofthe Court, the sum of their logic went only to the propensity of appellants to commit crimes (Osborne v. U.S., 351 F. 2d 111; Mills v. U.S., 367 F. 2d 366.

It cannot rationally be expected that a jury could and would separate, as to each appellant, the vast amount of detail of post-conspiracy narcotics activities and other crimes in the testimony of Ramos. In Corallo v. U.S., 309 F. Supp. 1282 at page 1285, Tyler, J., said that as to co-defendants, evidence of one defendant's non-charged criminal activities might "spread a patina of guilt" which would emanate not from the evidentiary facts but from the fact of association at the defense table (Developments in the Law-Criminal Conspiracy, 72 Harv. Law Rev. 920, 980.)

As for the argument that the court did give repeated cautionary instructions to the jury, Mr. Justice Brennan has said,

> "There are some contexts in which the risk that the jury will not or cannot follow instructions is so great, and the consequences of failure so vital to the defendants that the practical and human limitations of the jury system cannot be ignored", (Bruton v. U.S., 391 U.S. 123, 135, citing Kotteakus v. U.S., 328 U.S. 750; U.S. v. Socony Vacuum Oil Co., 310 U.S. 239, 242).

In Kotteakus v. U.S. (supra), the Court criticized the admission of criminal activities, similar in purpose, but not part of the charged conspiracy. The Court said at ;. 772:

> "Guilt is individual and personal even as respects conspiracies. It is not a matter of mass application."

And at p. 773:

> "When many conspire they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass."
>
> "Criminal they may be, but it is not the criminality of mass conspiracy."

And at p. 776, the Court went on, that as a conspiracy is broadened, the

> "possibilities of miscarriage of justice to particular individuals becomes greater and greater". Gebardi v. U.S., 287 U.S. 112.

The situation is further aggravated when two of the defendants brought in Herbert Sperling as a witness for the defense. The lurid details provided the jury by Sperling concerned post-conspiracy activities (if they were activities at all) of other defendants and should not have been received as against Morris. Even though the Court charged the jury that the conspiracy terminated as to Morris, the mere macabre fascination of other evidence was so tainted as to jeopardize Morris' appearance before the jury.

POINT II

The defendant is urged throughout his trial, and urges before the Appellate Court that he was previously placed in jeopardy as a result of his Ohio conviction and of his Michigan Federal conviction (Ashe v. Swenson 397 US 436) provides for collateral estoppel and although the State of Ohio is a separate sovereign, the Federal Court conviction in Michigan was for a substantive violation of the Narcotic Laws which resulted from Morris' arrest at the Detroit Airport. I am mindful of this Court's opinion in U.S. vs. Nathan (Boulier) (Docket 72-1895 decided 3/16/73), but every attorney is hopeful that an Appellate Court can reverse a previous decision or break new ground.

POINT III

A severence should have been granted because of the antagonistic defenses of the other defendants and the overwhelming volume of testimony as offered against the other defendants and the fact that the prejudicial joinder was in violation of this Court's doctrine set forth in U.S. vs. Bentvena (319 F. 2d 916). I further urge the Court to permit the defendant-appellant Morris to adopt all appellate points listed by co-defendants and a copy of this brief will be sent to Mr. Morris, and I urge before the Court makes any decision, to permit Morris to file any additional legal memorandum on his own behalf.

CONCLUSION

WHEREFORE, I respectfully submit that the post-conspiracy evidence coupled with a multi-conspiracy problem and antagonistic defenses of the other defendants prevent Morris from enjoying full due process of law, and accordingly, the judgment of conviction should be reversed.

Respectfully submitted,

JOSEPH I. STONE
Office & Post Office Address
277 Broadway
New York, New York 10007

March 19, 1974

Mr. Alan Morris
Federal House of Detention
427 West Street
New York, New York

Dear Mr. Morris:

Enclosed please find a copy of the brief which I am submitting to the Court.

As you will note I have reserved your right to add any appellate issues that you would like.

Very truly yours,

Joseph I. Stone

/mc
Enc.